Fair Political Practices Commission
Memorandum

To: Chairman Randolph and Commissioners Blair, Downey, Huguenin and Remy

From: Joan Giannetta, Regulations Coordinator, Legal Division
John W. Wallace, Assistant General Counsel
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Subject: Adoption of Proposed Amendments to Regulations 18312, 18316.5, 18326, 18401, 18521, 18537.1, 18704.5, 18705.1, 18705.5, 18730, and 18746.2: Technical Changes to the Political Reform Act

Date: October 26, 2006

Executive Summary

Commission staff periodically conducts a review of regulations to the Political Reform Act[1] (the "Act") and presents non-substantive amendments to insure general uniformity throughout the California Code of Regulations ("CCR"), title 2, division 6. Several technical "clean-up" amendments are currently proposed which will eliminate outdated references or make similar conforming changes. Although the proposed amendments are technical in nature, they have been noticed to the public. As of the date of this memorandum, no public comment has been received. Staff recommends adoption of the following proposed amendments and has included the full text of each regulation as an attachment to this memorandum.

Overview of Specific Regulations Slated for Amendment

Item 1. Problem in Current Reading of Regulation 18312

This regulation has a number of technical revisions, primarily amendments to conform capitalization with other areas of text in the CCR, and one typographical change. They are summarized below:

Proposed Solution:

"(a) Definitions.
(1) Administrative Procedure Act: All references in this regulation to the 'Administrative Procedure Act' are to the provisions of the 'Administrative Procedure Act' that were in effect as of June 4, 1974

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[1] Government Code sections 81000 – 91014. Commission regulations appear at title 2, sections 18109 – 18997 of the California Code of Regulations.

(former Government Code ~~Title 2, Division 3, Part 1, Chapter 4.5, Sections 11371 et seq.~~ title 2, division 3, part 1, chapter 4.5, sections 11371 et seq.).

(2) California Administrative Register: All references in this regulation to the 'California Administrative Register' are to the California Administrative Register as set forth in Government Code ~~Section~~ section 11409 as that section existed on June 4, 1974, or to any successor publication of the Office of Administrative Hearings, as defined in subdivision (a)(4) of this regulation."

¶…¶

"(4) Office of Administrative Hearings: All references in this regulation to the 'Office of Administrative Hearings' are to the Office of Administrative Hearings as set forth in Government Code ~~Sections~~ sections 11371 et seq., as those sections existed on June 4, 1974, and to any state agency that succeeds the Office of Administrative Hearings, including the Office of Administrative Law."

¶…¶

At regulation 18312(b)(2):

"(2) The Commission or Commission staff may schedule a prenotice hearing on any regulation that will be the subject of Commission regulatory action in the future. The purpose of the prenotice hearing is to permit the Commission to consider and accept public comment regarding regulatory action proposed by the Commission staff. Any regulatory action to be considered at a prenotice hearing shall be publicized consistent with Government Code ~~Sections~~ sections 11120-11132."

¶…¶

At regulation 18312(b)(3)(A):

"Publication in a newspaper ~~or~~ of general circulation or in a trade or industry publication as prescribed by the Commission."

At regulation 18312(b)(3)(D):

"The failure to mail notice to any person as provided in ~~Section~~ section 11423 as that section existed on June 4, 1974, shall not invalidate any action taken by the Commission."

At regulation 18312(b)(4):

> "The Commission shall consider the regulatory action on or after the date and time designated in the notice, and shall afford interested persons an opportunity to comment. Written comments should be submitted to the Commission no later than 12:00 p.m. of the business day preceding the day of the hearing to afford them adequate time to fully consider the comments. Any regulatory action to be considered shall be publicized consistent with Government Code ~~Sections~~ sections 11120-11132."

At regulation 18312(e)(1)(B) & (C):

> "(B) Any emergency regulatory action shall become effective upon filing with the Secretary of State and the Rules Committee of each house of the Legislature pursuant to subdivision (c)(2) of this regulation, unless ~~subdivision~~ subsection (e)(1)(A) of this regulation applies.
> (C) Regulations prescribing the Commission's organization or procedures shall become effective upon filing with the Secretary of State, unless ~~subdivisions~~ subsection (e)(1)(A) or (e)(1)(B) of this regulation ~~apply~~ applies."

Item 2. Problem in Current Reading of Regulation 18316.5(a)(2)(B):

Regulation 18316.5(a)(2)(B) refers to a California Continuing Education of the Bar publication that is no longer available; however, the information contained in the manual has all been compiled and placed on our website.

Proposed Solution:

> "…A person will be deemed to have 'diligently researched' the subject related to the advice given if he or she has reviewed the applicable provisions of this title and the regulations, opinions, and manuals of the Commission, including the compilation of such documents contained ~~in the California Continuing Education of the Bar publication, titled 'California Fair Political Practices Commission,'~~ on the agency website at www.fppc.ca.gov, as well as any applicable reported appellate court decisions and the California Code of Regulations."

Item 3. Problem in Current Reading of Regulation 18326(a):

Regulation 18326(a) provides the petitioner, a commissioner or the Executive Director the opportunity for a rehearing if a formal opinion by the Commission has been ***adopted***, but not if the opinion has been rejected, when a rehearing would be the logical remedy.

Proposed Solution:

> "(a) Within 14 days after the adoption or rejection of a formal opinion by the Commission, the person who submitted the opinion request, a Commissioner or the Executive Director may petition the Commission to grant a rehearing."

Item 4. Problem in Current Reading of Regulation 18401:

Regulation 18401 at subsection (a)(2)(B) reads "nonmenetary" instead of "nonmonetary" in text.

Proposed Solution:

> "…Original source documentation shall include contributor cards, letters of transmittal, and notices received from contributors. In addition, in the case of a ~~nonmenetary~~ nonmonetary contribution, if the contributor has not provided a notice indicating the value of such nonmonetary contribution…."

Item 5. Problem in Current Reading of Regulation 18521:

Prior to 2001, a state candidate could redesignate a reelection committee for the same office if he or she took certain steps. (See, e.g., *Pearson*, Advice Letter No. I-91-287.) However, when the contribution limits of Proposition 34 went into effect, the Commission determined that redesignation applicable to different elections was improper; therefore, redesignation was disallowed when regulation 18521 was adopted. (See *Proposition 34 Regulations: Adoption of Proposed Regulation 18537.1 construing § 85317 (Carry Over of Contributions); Adoption of Proposed Regulation 18520, and Amendments to Regulations 18521, 18523, and 18523.1 Interpreting §§ 85200 and 85201 ("One-Bank Account Rule")*, by John W. Wallace, dated February 28, 2002.) However, the regulation does not explicitly state this prohibition and questions continue to arise as to whether redesignation by state candidates is permitted in the same manner as it is permitted for local officials under the regulation. This technical change would expressly state the prohibition, as determined by the Commission in 2002.

Proposed Solution:

> "(b) Candidates, Other than Candidates for Elective State Office: A controlled committee and campaign bank account established for a specific office may be redesignated as a campaign bank account for a future election if:
>
> (1) The future election is for the same elective office;

(2) The funds in the campaign bank account/committee are not considered 'surplus campaign funds' as defined in Government Code section 89519;
(3) The candidate amends the Statement of Organization for the committee to reflect the redesignation for the future election;
(4) The candidate files a new statement, signed under penalty of perjury, of intention to be a candidate for the specific future election; and
(5) Redesignation of committees/bank accounts is not otherwise prohibited by law.

(c) Redesignation by candidates for elective state office is prohibited at the state level.

Item 6. Problem in Current Reading of Regulation 18537.1:

A suggestion to add the provisions of Government Code section 85318 ("Contributions Received for Primary and General Elections") at 18537.1(d) has been submitted:

Proposed Solution:

"(d) A candidate who establishes a campaign bank account for an election but does not file the necessary documents or otherwise fulfill the requirements of the Election Code to appear on the ballot in that election may not 'carry over' campaign funds, but may transfer with attribution pursuant to Government Code section 85306 and consistent with Government Code section 85318."

Item 7. Current Problem in Reading of Regulation 18704.5:

Regulation 18704.5 is a single sentence regulation that is preceded by an (a). This proposal suggests removing the subdivision letter in light of the brevity of this regulation. Additionally, a grammatical error has been corrected.

Proposed Solution:

Delete the (a) from regulation 18704.5.

"~~(a)~~ A public official or his or her immediate family ~~are~~ is deemed to be directly involved in a governmental decision which has any financial effect on his or her personal finances or those of his or her immediate family."

Item 8. Problem in Current Reading of Regulation 18705.1:

Regulation 18705.1 sets forth the materiality standard for business entities in which a public official has an economic interest for purposes of determining whether there is a conflict of interest in a governmental decision.

Regulation 18705.1(b)(2) lists exceptions to the rule stated in 18705.1(b)(1) that the financial effects of a governmental decision on a business entity which is *directly* involved in the governmental decision is presumed to be material. For business entities that are *indirectly* involved in governmental decisions, regulation 18705.1(c)(2) sets forth the relevant materiality standards. In both instances, reference is made to the New York Stock Exchange ("NYSE") listing requirement. That requirement was previously based on a company's earnings for its most recent fiscal year. Since the adoption of this regulation, the NYSE has changed its listing requirements, creating confusion as to what standard to apply.

Proposed Solutions:

The proposed amendments attempt to mirror the new listing requirements as set forth in the NYSE Listed Company Manual. The NYSE changed the financial requirements for initial listing by going from an earnings test based upon the prior fiscal year ($2.5 million), to a three-pronged test which takes into account a company's aggregate earnings over the last three fiscal years (minimum of $10 million), minimum earnings for each of the last two fiscal years ($2 million), and requires that there be positive earnings in each of the last three fiscal years.

If the intent of the regulation is to mirror the NYSE listing requirements, the amended language should be adopted. While the three-prong test is more complicated than the current one-year ($2.5 million) test and may raise questions for business entities that are less than three years old, it is consistent with the original intent in adopting the current regulation. Thus, the commission may also want to consider creating a new or simplified standard that does not conform to the NYSA standard. If the Commission decides that they wish to create a new or simplified standard that does not conform to the NYSE standard, this item would be removed from the technical packet and added to the regulatory calendar for 2007 and proceed as a new independent regulatory project.

Regulation 18705.1(b)(2):

"(2) Exception: If the public official's only economic interest in the business entity is an investment interest (see Government Code section 87103(a)), and the public official's investment in the business entity is worth $25,000 or less, then apply the materiality standards in subdivision (c)(1) of this regulation if the business entity is listed on the Fortune 500, or the materiality standards in subdivision (c)(2) of this regulation if the

business entity is listed on the New York Stock Exchange, or if not listed on the New York Stock Exchange, ~~for its most recent fiscal year~~ had earnings before taxes of no less than:

(A) ~~$2.5 million, or~~ $10 million in the aggregate for its three most recent fiscal years, together with a minimum of $2 million for each of its two most recent fiscal years, and positive amounts in all three years, or
(B) such other amount described at Rule 102.01C of the New York Stock Exchange's Listed Company Manual (or any superseding rule of the New York Stock Exchange describing its financial standards for initial listing)."

The same regulation also has proposed amendments at 18705.1(c)(2) and (c)(3):

Regulation 18705.1(c)(2):

"If the business entity is listed on the New York Stock Exchange, or if not listed on the New York Stock Exchange, ~~for its most recent fiscal year~~ had earnings before taxes of no less than ~~$2.5 million~~ $10 million in the aggregate for its three most recent fiscal years, together with a minimum of $2 million for each of its two most recent fiscal years, and positive amounts in all three years, or such other amount described at Rule 102.01C of the New York Stock Exchange's Listed Company Manual (or any superseding rule of the New York Stock Exchange describing its financial standards for initial listing), the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that…."

Amended language proposed for regulation 18705.1(c)(3):

"If the business entity is listed on either the NASDAQ or American Stock Exchange, or if not so listed, for its most recent fiscal year had: net income of no less than $500,000 (or such other amount described in the minimum financial requirements for continued listing on the NASDAQ ~~SmallCap market~~ Capital Market), or earnings before taxes of no less than $750,000 (or such other amount of earnings before taxes described under initial listing standard 1 of Section 101(a) of the Rules of the American Stock Exchange, or any superseding Section of the Rules of that Exchange), the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that…."

Item 9. Problem in Current Reading of Regulation 18705.5:

It appears that the phrase "***or his or her immediate family***" was left out of the newly proposed version of regulation 18705.5 in 2000 when it was amended. Specifically, Phase II in this case relocated the then-current 18703.5 language to regulation 18705.5, "so that the 'exception' to application of the personal

financial effects rule would be located where the materiality standard for that rule is given." The proposed amendments to regulation 18705.5(a) appeared as follows:

> "(a) A reasonably foreseeable ~~personal~~ financial effect on a public official's personal finances is material if it is at least $250 in any 12-month period. When determining whether a governmental decision has a material financial effect on a public official's economic interest in his or her personal finances, neither a financial effect on the value of real property owned directly or indirectly by the official, nor a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which the official has an investment interest shall be considered."

In 1999, regulation 18703.5 addressed the materiality standard to read:

> "A governmental decision has a personal financial effect on a public official if the decision will result in the personal expenses, income, assets or liabilities of the official ***or his or her immediate family*** increasing or decreasing. When determining whether a governmental decision has a personal financial effect on a public official, a financial effect on the value of real property owned directly or …."

For this reason, it would appear the language in question from regulation 18703.5 should have also been included when amending regulation 18705.5.

Proposed Solution:

> "(a) A reasonably foreseeable financial effect on a public official's or his or her immediate family's personal finances is material if it is at least $250 in any 12-month period. When determining whether a government decision has a material financial effect on a public official's economic interest in his or her personal finances, neither a financial effect on the value of real property owned directly or indirectly by the official, nor a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which the official has a direct or indirect investment interest shall be considered."

Item 10. Problem in Current Reading of Regulation 18730(b)(1)[2]:

Regulation 18730 should refer to regulation 18110 and not regulation 18100 in the text at subdivision (b)(1) when referring to California Code of

[2] This regulation is also proposed to be amended to reflect an adjustment to the gift limit. See staff memorandum, "Biennial Gift Limit Adjustment: Adoption of Amendments to Regulations 18703.4, 18730, 18940.2, 18942.1, and 18943," dated October 26, 2006.

Regulations, division 6, chapter 1 as regulation 18110 is the first regulation to appear in division 6:

Proposed Solution:

"(b) The terms of a conflict of interest code amended or adopted and promulgated pursuant to this regulation are as follows:

(1) Section 1. Definitions.

The definitions contained in the Political Reform Act of 1974, regulations of the Fair Political Practices Commission (2 Cal. Codes of Regs. ~~sections 18100, *et seq.*~~ sections 18110 et seq.) and any amendments to the Act or regulations, are incorporated by reference into this conflict of interest code."

Item 11. Problem in Current Reading of Regulation 18746.2:

The current reading of this regulation defines when a formal or informal appearance or oral or written communication is for the purpose of influencing. As regulation 18746.1(b)(5), interpreting section 87406, points to 18746.2 to define which appearances or communications are for the purpose of influencing, regulation 18746.2 specifies that the regulation is for the purposes of section **87406** *(the one year ban)*.

However, regulation 18741.1(a)(3), interpreting the state *permanent ban* of section **87401**, *also* refers to regulation 18746.2 to define which appearances or communications are for the purposes of influencing. Accordingly, regulation 18746.2 also defines which appearances or communications are for the purpose of influencing for the purposes of section **87401** *(the permanent ban)*.

Additionally, should the proposed amendments of regulation 18746.3, interpreting the local one-year ban of section **87406.3**, be adopted by the Commission in December when it is scheduled for presentation, regulation 18746.2 will *also* define which appearances or communications are for the purpose of influencing for the purposes of section **87406.3**.

Proposed Solution:

Remove the reference to Government Code section 87406 in regulation 18746.2 and add sections 87401, 87406.1 and 87406.3 to the reference section of this regulation:

"(a) ~~For purposes of Government Code Section 87406, a~~ A formal or informal appearance or oral or written communication is for the purpose of influencing if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding. An appearance or communication includes, but is

not limited to, conversing by telephone or in person, corresponding with in writing or by electronic transmission, attending a meeting, and delivering or sending any communication."

¶…¶

Reference: ~~Section~~ Sections 87401, 87406, 87406.1 and 87406.3, Government Code.

Attachments: Regulation 18312
Regulation 18316.5
Regulation 18326
Regulation 18401
Regulation 18521
Regulation 18537.1
Regulation 18704.5
Regulation 18705.1
Regulation 18705.5
Regulation 18730
Regulation 18746.2

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